has had an opportunity by law, or whether provided by law or not, has had an actual opportunity to he heard on the question of the existence of the nuisance, the officers abating the nuisance are protected by such an order issued after a hearing, while some of cases have held, that an order to abate a nuisance issued after such a hearing may not be attacked except in a direct way (see, *e. g.*, Raymond v. Fish, 51 Conn. 80, and Metropolitan Board of Health v. Heister 37 A. Y. 661). To one who is interested in an efficient administration of the police power as it affects the public health, this is a very important matter. Such a one can hardly regret that this subject has not received a fuller treatment by Mr. McGehee.

On p. 212 our author makes a statement without qualification which is not supported by all the decisions and would not seem to be sound when looked at from the point of view of fundamental theory, namely, that the power of taxation cannot be delegated to private corporations (see, *e. g.*, Anderson v. Kerns Draining Co., 14 Ind. 199, and Drainage Co. Case, 11 La. Ann. 338).

But apart from a few such too broad statements the book is an extremely valuable one and cannot fail to fill a much needed place.

FRANK J. GOODNOW.

The American Nation. Vols. xvi, xvii, xviii, xix. (New York: Harper Brothers, 1906.)

Slavery and Abolition, 1831–1841. By ALBERT BUSHNELL HART. Pp. xv, 360.

Westward Extension, 1841–1850. By GEORGE PIERCE GARRISON. Pp. xiv, 366.

Parties and Slavery, 1850–1859. By THEODORE CLARKE SMITH. Pp. xvi, 341.

Causes of the Civil War, 1859–1861. By FRENCH ENSOR CHADWICK. Pp. xiv, 372.

These volumes cover the period from the rise of abolitionism to the outbreak of the Civil War. Professor Hart pictures the institution of slavery from all sides, summarizes the abolitionist attack upon it, and the argument returned by its defenders, and sketches the relations of abolitionism with the slave, the slave-holder, the government, and political anti-slavery. He emphasizes the isolation of the South in consequence of what Southerners themselves significantly named

"the peculiar institution," and shows that that section was forced by the opinion not merely of the abolitionists but of the world at large, into a self-defensive, self-conscious attitude, which made it indisposed to meet even friendly criticism half way, or to try reforms of obvious wisdom. Professor Garrison deals with the renewal of the westward movement, because of the hard times that followed the panic of 1837, relates the story of Texan annexation, the occupation of Oregon, and the Mexican War, the military side of which he slurs, and sketches the rise of the slavery question in consequence of the acquisition of so much new territory—pursuing the narrative through the compromise of 1850. He insists convincingly that the annexation of Texas and the conquests from Mexico are to be regarded as the natural outcome of American expansion, rather than of a pro-slavery conspiracy, and holds that the former at least was hampered rather than helped by its connection with the slavery question. Professor Smith, beginning with the struggle for "finality" between the years 1850 and 1852, traces the rise, in consequence of the Kansas-Nebraska question, of those sectional parties which the framers of the finality dogma had foreseen and feared. His volume is one of the notable ones of the series in which it stands, both for style, arrangement, subject matter, and the attitude of mind which it reveals. Almost never does its author become the champion of any theory, but is content to regard ideas as forces moving opinion and so determining events, and to evaluate them as such rather than as ultimate truths. The two final chapters exhibit the complete sectionalization of the country on the eve of the civil war. It is with this same field that Admiral Chadwick opens his volume, the bulk of which, however, he devotes to an excellent narrative of the closing days of Buchanan's administration and the opening days of Lincoln's, and the fall of Fort Sumter. Never were the ineptitude and senility which an era of compromise had brought to power in the person of Buchanan better portrayed. Admiral Chadwick has a most unacademic but by no means reprehensible way of sizing up his characters, who, to his mind, are no mere lay figures of a process. Another point of interest is his theory that the struggle over the territorial question, which led directly to the war, was a needless dispute over a pure abstraction, which of course was Webster's view in his famous seventh of March speech.

It is not, however, the purpose of this review to criticsie these volumes, but to review briefly two or three of the many constitutional

questions, in the guise of which the issue between the opponents and defenders of slavery appears at every turn, particularly the question of the relation of slavery and constitutional liberty, the territorial question, and the question of the right of secession. One of the facts which the slavery men adduced to prove the incompatibility of slavery and constitutional liberty, the irrepressible conflict of the two conceptions, was the ambiguous position of the free black man in the North as well as the South. In Chapter VI of his volume, Professor Hart shows that in legal status a free negro lost ground steadily from the time of the Revolution in both free and slave States. Between 1792 and 1838 he was excluded from the suffrage in Delaware, Maryland, Virginia, Kentucky, New Jersey, Connecticut and Pennsylvania. Other unfriendly legislation ensued. "Ohio began in 1803 to build up a black code, proceeding to a demand for a bond of $500 for negroes who might come into the State, and denying to the negro the right of testimony in cases in which a white man was a party, or admission to the public schools. Similar provisions were enacted by Indiana, Illinois, and Iowa, when they came into the Union. Illinois even prohibited the coming of negroes into the State on any terms" (page 83). In the slave-holding States the disabilities of the free negro were still more onerous. In four he had to have a guardian; in eight he was obliged to be registered; in general his testimony was not accepted against the white man. His right to engage in business was limited on every hand. Congress's attitude was no more friendly. True the implication of the second Missouri comprise is that a free negro might become "a citizen of a State," in the meaning of the fourth article of the Constitution. But on the other hand congress never recognized the right of other than white persons to acquire citizenship by naturalization, and the presumption of both fugitive slave laws was that an African was a slave. The question of citizen ship received its final solution at the hands of the courts. In 1833, Judge Daggett of Connecticut decided that a free negro was a person but not a citizen, thus foreshadowing Taney's decision in the Dred Scott Case. Whatever rights and privileges of citizenship a State might confer upon a free negro, Taney declared, it could not make him a citizen within the meaning of the United States Constitution. This conclusion Justice Curtis ably combated, but it would seem that the preponderance of fact was on the side of the Chief Justice.

But not only did slavery degrade the free black man, it also constituted a standing menace to the liberties of the white race, at least

so it was contended. This is Lincoln's argument in his ironical paradox, demonstrating the reciprocal right of A and B, the one white and the other black, to enslave one another (Hart, p. 322); and it receives rather startling confirmation from Calhoun's justification of slavery as the bulwark of an aristocratic Republic (Chadwick, p. 41). The origin of the argument, however, dates from the attempt of those members of congress who decried the rising agitation of the slavery question, first to burke anti-slavery petitions, and secondly, to authorize exclusion of incendiary publications from the mails. On May 26, 1836, the House resolved "that all petitions * * * relating in any way * * * to the subject of slavery * * * shall without being either printed or referred, be laid upon the table, and that no further action whatever shall be had thereon;" and four years later it made a standing rule that no memorial on slavery should be entertained in any way whatsoever. Such was the gagging policy against which John Quincy Adams fought with every available parliamentary device, to his triumph in December, 1844. Were the gag resolutions unconstitutional? Professor Hart seems to think (p. 260) that the question is determined by the first amendment, but what the first amendment does is to prohibit the enactment by congress of *laws* abridging freedom of speech, the press, petition, etc. It is necessary only to point out that a resolution adopted by a single chamber to determine its parliamentary procedure is not a law. Calhoun's proposition in 1836, "that any mail matter other than letters touching the subject of slavery, should not be delivered in any State prohibiting the circulation of such matter" (p. 287), stood on another footing; and the objections to it under the first amendment and also as an attempt to make as many "kinds of federal law as there were varieties of State legislation on the subject" prevailed with comparative ease. "Nevertheless," as Professor Hart observes, "in our day the disputed principles have been conceded." Congressional enactment excludes obscene literature and lottery literature from the mails, and *In re* Rahrer (140 U. S., 545) the supreme court upheld an act of congress exactly akin to Calhoun's measure (26 Stat. at Large, 313).

The history of the territorial question occupies chapters xvi, xix and xx of Professor Garrison's volume and most of Professor Smith's volume. Briefly summarized, it is as follows: Everybody in 1820 conceded to congress the right to deal with the territories with regard to slavery as it deemed expedient. By 1860 both the pro-slavery

and anti-slavery parties had discovered a limitation upon congress's power in that phrase of the fifth amendment which declares that "No person shall be * * * deprived of life, liberty or property without due process of law." The anti-slavery following, however, regarding the negro as a person, though "held to service" in certain States, emphasized the word "liberty" in the above quoted clause and denied congress's right to *admit* slavery *into* any territory; while the pro-slavery men, viewing the negro "held to service" as property, emphasized the word "property," and denied congress's power to *exclude* slavery *from* any territory. In the Dred Scott decision the supreme court adopted the pro-slavery view which was then ten years old. The anti-slavery, or rather the Republican, position was developed in consequence of this decision. Professor Smith exhibits the *obiter* character of that portion of the Dred Scott decision which deals with the territorial question most clearly. On the other hand, I cannot accept his view, though it is the usual one, that the Southern demand in 1859 for federal protection of slavery in the territories represented an advance upon the Dred Scott decision. It was settled doctrine from the outset, that wherever slave property fell within the jurisdiction of the federal government, it was entitled to federal protection like any other property; and the government steadily extended diplomatic protection to the coastwise slave trade (Cases of *The Comet*, etc., *Hart*, 292, *ff*). The Dred Scott decision is not without its interest in our contemporary jurisprudence. Taney's most fundamental assumption was that congress must take its ideas of property from the States, an idea which still comprise an element of the supreme court's thinking. The original package case above referred to is evidence of this fact, and the lottery decision (188 U. S., 321) is a further illustration of it. The view that territories are part of the United States independently of the action of congress, was of course overruled in the recent insular decisions (182 U. S.).

My reason for discussing the question of secession is furnished by Professor Garrison's confident dictum on p. 12 of his work, that both North and South originally regarded the union under the Constitution as a confederacy, from which any State might withdraw at will, which expression of opinion, however, he follows up by the admission in a footnote that this is a "vexed question." By 1860 the Southern people were generally convinced that the States possessed the right to secede from the Union, not as a revolutionary right—revolution-

ary rights being less in repute than at the time of the Declaration of Independence—but as a sovereign right. What kind of a right is, or was, a sovereign right? It must be admitted at the outset that the doctrine of the right of secession as a sovereign right owed some degree of its success, not improbably, to its more or less hazy character. Not many have very clear ideas on the subject of sovereignty even today; perhaps such ideas were not clearer fifty years ago; and there is no doubt that the men who framed and adopted the Constitution rose from the perusal of their Locke with notions of the matter that were very vague indeed. But this of course is by no means the whole story, or even a large part of it. The words sovereign and sovereignty were woven by Calhoun into a dialectical fabric of admirable consistency, the warp and woof whereof was spun from the history of the Republic itself. First then, I shall state Calhoun's argument in outline, secondly indicate its points of contact with questions of historical fact, and finally review some contradictory verdicts on these questions of fact. But this last with the idea merely of making some suggestion which should be taken into account before arriving at any conclusions on the points in dispute, and not at all with the idea of composing the dispute itself.

Calhoun formulated the following syllogism: The States were sovereign before the adoption of the Constitution; sovereignty is indivisible; therefore, while delegating certain powers to the government created by the Constitution, the States did not part with any of their sovereignty to it. From this body of doctrine certain other doctrines issued: first, that the Constitution was a compact between the sovereign States; the alternative view, stated by Webster, being that it was the enactment of an already existing sovereign; second, that the sovereign States remained each the final interpreter of the Constitution for itself; the alternative view being that the supreme court of the United States possessed this function; third, that the States remained free, each, to withdraw from the Union, created by the Constitution whenever it should see fit; the alternative view being that the States were bound by the Constitution irrevocably (Chadwick, chapter iii.) The questions of fact raised by these assertions we may easily isolate, but before proceeding to do so we should notice that in each case the question raised is of the existence of certain notions rather than of certain external conditions, at a certain time. Thus, first, were the States *thought* to be sovereign before the adoption of the Constitution; second, was sovereignty *thought* to be

indivisible at that time? third, Was the Constitution *thought* to be a compact? fourth, Were the States *thought* to be the final interpreters of the Constitution, each for itself? fifth, Were they *thought* to have the right to withdraw from the Union at will? We may take these questions up seriatim.

(1) On this topic the reader should see Professor Van Tyne's article in the current number of *The American Historical Review* (April, 1907), entitled Sovereignty in the American Revolution. The writer shows conclusively that before the adoption of the Constitution sovereignty was attributed to the States with great unanimity. But does this dispose entirely even of the question under consideration? While the States were called sovereign, there was also some recognition at least that their community of language, descent and interest, made the American people a nation, and "the American Nation" was a frequently recurring phrase in the pages of *The Federalist*. Of course it may be said that the idea of an American nation was ethnical merely, an idea without any counterpart in the realm of political organization; that the States were the only political organizations of the time; and that sovereignty is the attribute of such an organization. On the other hand, there is Professor Burgess's suggestion that the American nation before the adoption of the Constitution was already politically organized in the convention that framed it and in the conventions that ratified it. (2) On this question the evidence is overwhelming that the constitutional fathers believed not only that sovereignty was divisible, but that they had divided it between the States and the Union. (*Federalist*, No. 39, by Madison.) Utterances of those who regarded it as divisible are, therefore, of doubtful import if not actually beside the point when any question touching the residence of sovereignty subsequently to the adoption of the Constitution is under consideration. (3) On this point Professor McLaughlin's *Social Compact and Constitutional Construction* (*American Historical Review*, vol. v, 467–490) is most convincing. Summing up his case, the writer says (*The Confederation and the Constitution. The American Nation*, vol. x, p. 314.): "At times the Constitution was spoken of as a compact, but this never meant a mere agreement equivalent to a treaty between sovereign States. Compact was the most solemn and serious word in the political vocabulary of the men of that generation; society itself was founded on compact, and government rested on the same foundation." It was with the recent discussion on nullification and the novel

ideas of compact and sovereignty therein developed in mind that Madison, writing in 1830 warned his countrymen against "errors which have their sources in * * * the silent innovations of time on the meaning of words and phrases." (4) On this point the issue being more definite, the evidence is also more definite. On the other hand it is singularly contradictory. The right which Webster claimed for the supreme court in 1830 and which everybody today recognizes that it possesses, of determining the constitutionality of congressional enactments, was not bestowed upon it in terms by the Constitution. But there were those in the convention of 1787 who asserted that the right would fall to the supreme court because of its position, and this view is often strongly voiced in the conventions that ratified the Constitution, and Hamilton expounds it at length in *The Federalist* (No. 81). On the other hand, Madison contradicted the notion, and in *Federalist* No. 46 actually foreshadows nullification. But the corner stone of nullification was really laid by Madison's report to the Virginia legislature in 1799. Madison now accepted the notion that the supreme court may decide as to the constitutionality of acts of congress, but such a decision, he urged, was binding only upon the coördinate departments of the federal government, not upon the States. When, however, the supreme court did finally overrule an act of congress, in 1803 (Marbury v. Madison), it grounded its right to do so on the assumption that there is a sovereign people of the United States, who enact the Constitution and whose peculiar spokesman the court itself is (see also Chisholm vs. Georgia). Taney's chief justiceship marked a period of constitutional reaction. Yet in that very decision, in which the court passes the meridian of strict construction, namely, the Dred Scott Case, the court pronounced invalid an act of congress. Moreover, that the court considered its decisions binding upon the States, is proved by Abelman v. Booth (Smith, p. 207). It may be objected that these decisions, being subsequent to the adoption of the Constitution, are not pertinent evidence on the question we are discussing. This is true. But it must be remembered, first, that the claims to the right of nullification and the right of secession also were put forth subsequently to the adoption of the Constitution, and secondly, that the Constitution is an advancing conception. Now granting that the above evidence shows that the supreme court's conception of the Constitution was authoritative when these claims arose, does not the question present itself as to how these claims accorded with this contemporary authoritative

view of the Constitution, especially since the real question at issue is the revolutionary or non-revolutionary character of succession? The objection, however, is very much to the point in evaluating the utterances of minorities like the Virginia and Kentucky resolutions, and the resolutions of the Hartford convention, which were neither authoritative nor contemporary with the adoption of the Constitution. (5) On this point I prefer to oppose to Professor Garrison's view the view expressed by Professor McLaughlin in his companion volume of the same series, leaving it to the reader, to canvass the evidence offered by each writer. Says Professor McLaughlin (*Confederation and Constitution*, p. 314): "There is absolutely no evidence to support the notion that they (the framers of the Constitution) believed they were simply entering into a new order of things, in which the States would have the right as before to refuse obedience and to disregard obligations, or from which they could at any time quietly retire when they believed the Union did not suit their purposes. Everything points to the fact that they intended to form a real government and a permanent union. All the solemn debates in the State conventions, all the heated arguments of the anti-federalists, all the outcry against the establishment of a consolidated government are absurd, meaningless, if the people felt that they had the legal right to go right on just as before, and leave the union when they saw fit."

In conclusion, I wish to emphasize the appreciation that one gains from reading these volumes, of the inadequacy of the formula "State rights versus Nationalism," as a statement of the issue between the sections in 1860. In the first place, at that time the North was fully as strict constructionist as the South, and had been since the days of Jackson, and anti-slavery had always shown itself fully as capable of taking a narrow view of federal powers as pro-slavery, and vice versa. In the second place, the South was as desirous of nationality as the North, but keenly self-conscious and aware of its peculiarity. It felt that the nation that desired it was no longer possible within the old Union, while the North, unaware of any peculiarity of its own, and not really appreciating that of the South, continued to believe with something like simplicity indeed in the old idea of American nationality—"the Nation" was a phrase frequently on Lincoln's lips—and to regard the Union as the only possible embodiment of that nationality.

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